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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 618

ALLIED THEATRE OWNERS OF INDIANA, INC.,
d/b/a THEATRE OWNERS OF INDIANA,
SYNDICATE THEATRES, INC., and
CAPITOL CITY THEATER CORPORATION,

Petitioners,

vs.

JOHN A. VOLPE, as Secretary of Transportation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioners, Allied Theatre Owners of Indiana, Inc., d/b/a Theatre Owners of Indiana, Syndicate Theatres, Inc., and Capitol City Theater Corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in these proceedings on May 22, 1970.

OPINIONS BELOW.

The opinion of the Seventh Circuit Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 1a-5a. The judgment of the United States District Court for the Southern District of Indiana denying the petitioners' request for a preliminary injunction appears in Appendix C, infra, pp. 7a-8a.

JURISDICTION.

The opinion of the Seventh Circuit Court of Appeals was handed down on May 22, 1970. On July 28, 1970, this Court extended the time for filing the petition for writ of certiorari to and including September 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Did Defendant, by establishing a time boundary for Indiana which placed all of the state in the Eastern Zone except six counties in the northwest corner and six counties in the southwest corner, exceed his statutory authority and limitations?

2. Was Defendant's action in establishing the Indiana time boundary arbitrary and capricious?

FEDERAL STATUTE INVOLVED.

The Federal Statute primarily involved is the Uniform Time Act of 1966, 15 U.S.C. Sections 260-267.

STATEMENT OF THE CASE.

Jurisdiction in the Federal District Court was conferred by the Uniform Time Act of 1966, 15 U.S.C. §260-267 (hereinafter referred to as the "1966 Act"), set out in Appendix E, infra, pp. 20a-25a and the Administrative Procedure Act, 5 U.S.C. §706. The jurisdiction of the Seventh Circuit Court of Appeals was invoked pursuant to 28 U.S.C. §1292(1).

On January 10, 1969, Defendant issued his rule establishing a new time boundary for the state of Indiana pursuant to authority granted him by the 1966 Act.(1) This rule (hereinafter referred to as the "New Boundary") placed all of Indiana in the Eastern Zone, with the exception of six counties in the northwest corner of the state and six counties in the southwest corner of the state, which were placed in the Central Zone.

Preliminary to issuing this rule, Defendant conducted no public hearings either in Washington, D.C., or in the state of Indiana. To the contrary, he denied Petitioners' request for a hearing.

All the Defendant did by way of making a record was to publish notices of proposed rule-making in the Federal Register and to receive the responses which resulted from such notices. Of the approximately 85,000 responses received, 50,000 favored placing all of the state in the Central Zone. Responses in support of the Central Zone were received from all parts of the state and from every type of group and organization, including numerous chambers of commerce and commercial, governmental, educational, and religious interests.

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(1) This rule was published in the Federal Register January 16, 1969, OST Docket No. 6, 34 Fed. Reg. 605. It is set out in Appendix D, infra, pp. 9a-19a.

Of the remaining 35,000 petitions, most wanted Central Daylight Time (Eastern Standard Time) year round. Almost none wanted Eastern Daylight Time.

The state of Indiana traditionally had been in the Central Zone and had observed Central Time. Since World War II, most of the state of Indiana had observed Central Daylight Time during the summer months, and in recent years most of the state had observed Central Daylight Time year round.

At no time prior to the taking effect of the New Boundary had any part of the state of Indiana ever observed Eastern Daylight Time.

The 1966 Act adopted without material change the provision of the Time Act of 1918 (hereinafter referred to as the "1918 Act"), 40 Stat. 450, which provided that each of the nation's time zones be based on specific degrees of longitude which are 15 degrees apart. The base meridian for the Eastern Zone is the 75th degree, and the base meridian of the Central Zone is the 90th degree.

For more than 35 years, the Interstate Commerce Commission (ICC), which was charged with administration of the 1918 Act, uniformly and repeatedly interpreted this statutory provision to mean:

> As far as possible the ideal is to be approached and the boundary lines will be fixed as close to the median meridian as a consideration of all interests will permit. 51 I.C.C. 273, 283.

See also, *e.g.*, 57 I.C.C. 455, 458; 218 I.C.C. 221, 226, 314 I.C.C. 101, 122-23.

The ICC properly felt that any significant deviation from the median meridians was beyond its statutory authority and that such distortions could be accomplished only by statutory amendment. See 15 U.S.C. 264, 265.

Although in the 1966 Act Congress made no material change whatsoever in the authority to establish time boundaries from that given the ICC by the 1918 Act, Defendant accorded himself authority to do what the ICC had said for more than 35 years could be done only by Congress. 218 I.C.C. 221, 225.

Defendant moved the western boundary of the Eastern Zone to about 88°, a little over 2° from the *base* meridian for the Central Zone and almost six degrees west of the median meridian (82½ degrees).

The stated policy of the 1966 Act is ". . . to promote the adoption and observance of uniform time within the standard time zones . . ." In this connection, the agency administering the 1966 Act is ". . . directed to foster and promote widespread and uniform observance of the same standard of time within and throughout each such standard time zone." 15 U.S.C. §260.

In the face of these express policies, the Defendant:

1. Split Indiana into two separate time zones so that for the first time in history it is impossible, as a matter of law, for the entire state to be on the same time during any part of the year.

2. Placed most of the state on Eastern Daylight Time, a time never before observed in Indiana, for six months out of the year.

3. Forced on the people of Indiana a time which they had overwhelmingly rejected, both in a prior referendum, 314 I.C.C. 127, and in their responses to the Defendant's notices of proposed rule-making.

Defendant clearly exceeded his statutory authority and entered an order which is both arbitrary and capricious. However, his action was approved by the District Court (see Appendix C) and the District Court's decision was affirmed on appeal. (See Appendices A, B.)

REASONS FOR GRANTING THE WRIT.

Time affects directly every living person, old or young, male or female. No one can escape it. It regulates work, sleep, travel, and play. It obtrudes literally into every minute of the day.

The impact of time boundaries on the life of a state's residents cannot be measured, but anyone who doubts the pervasiveness of this impact need only visit Indiana in the summer. For two summers surreal conditions have prevailed under the New Boundary, which placed Indiana a full two hours ahead of sun time during summer months.

During summer months the sun now sets in Indiana after 9:00 p.m. There is no "cool of the evening" in Indiana anymore. Indiana has almost become a land of the midnight sun.

Congress did not intend this fate for Indiana or any other state. There can be no question about that. Yet, an administrative agency, which did not even trouble itself to hold hearings in this state and which ignored the expressed preference of the vast majority of persons who did respond to the Defendant's notice, has imposed this obnoxious circumstance on all of Indiana's citizens.

If Defendant's rule is permitted to stand, there will be no conceivable limit to his authority to move time boundaries. Defendant believes that he may move the western boundary of the Eastern Zone as far west as the statutory base meridian for the Central Zone. If this were so, then it would follow that he also must have authority to move the eastern boundary of the Mountain Zone as far east as

the Central Zone meridian. He thus would have the authority to eliminate the Central Zone completely.

Ridiculous as it sounds, this result seems clearly within the scope of the authority Defendant contends he has.

Under the 1966 Act for the first time in history a federal administrative agency has authority not only to establish but also to enforce time zones. It is imperative that this authority and its limitations be reviewed by this Court in the interests of all the people of this country before greater harm and havoc are wrought through government by administrative fiat.

The Defendant's action raises an important question of federal law which has not been but should be settled by this Court.

CONCLUSION.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17866 SEPTEMBER TERM 1969 — APRIL SESSION 1970

ALLIED THEATRE OWNERS OF INDIANA, INC., d/b/a THEATRE OWNERS OF INDIANA, SYNDICATE THEATRES, INC., and CAPITAL CITY THEATRE CORPORATION,
Plaintiffs-Appellants,
vs.
JOHN A. VOLPE, as Secretary of Transportation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

May 22, 1970

Before DUFFY and HASTINGS, *Senior Circuit Judges*, and FAIRCHILD, *Circuit Judge*.

DUFFY, *Senior Circuit Judge*. On January 16, 1969, the Secretary of Transportation established a new time zone boundary for the State of Indiana (34 Fed. Reg. 605 (January 16, 1959)) pursuant to Section 4 (a) of the Uniform Time Act of 1966 (15 U.S.C. § 261 et seq.). Except for twelve counties in the extreme northwest and southwest portions of the state referred to hereinafter as the Gary and Evansville areas, the Secretary's action placed the State of Indiana in the Eastern time zone. The excepted twelve counties mentioned were placed in the Central time zone.

(Appendix A)

Plaintiffs filed suit in the District Court for the Southern District of Indiana seeking an injunction which would enjoin the enforcement of the new Time Boundary. A motion for a preliminary injunction was denied although the District Judge held that the plaintiffs had standing to bring the suit.

On March 19, 1918, during World War I, legislation was enacted setting time zones for the entire United States. Like the prior 1918 Act, the law passed in 1966 authorized and directed the Interstate Commerce Commission to carry out its policies. However, before the effective date of the 1966 Act, the functions, powers and duties of the Interstate Commerce Commission under the 1966 Act and also earlier Acts, were transferred to and became vested in the Secretary of the newly-created Department of Transportation, 49 U.S.C. § 1655 (e)(5).

Prior to 1918, this country had operated on what was known as "Railroad Time" which had enjoyed a semi-official status since 1883. But numerous communities had adopted time standards which differed from that used by the railroads. The need for standardization became apparent especially during World War I. On March 19, 1918, legislation was enacted which set time zones for the United States.

Historically, most of Indiana has observed Eastern standard time during the entire year except for some twelve to fifteen counties in the Gary and Evansville areas. These counties observed Central standard time in the winter months and Central daylight time in the summer months. The 1918 Act did not require observance of daylight time during the summer months and contained no enforcement provisions. This accounts for the fact that most of Indiana chose to ignore the 1961 zones established by the Interstate Commerce Commission.

Appellants are Indiana corporations which own and operate drive-in and indoor movie theatres in that State. The theatre owners complain that under the decision made by the Secretary, during the April to October half

of each year, the entire state of Indiana except for the Gary and Evansville areas, will be required to observe Eastern daylight time, and that it will be approximately 9:30 p.m. (EDT) before the sun sets and it becomes dark. They urge that the effect will be that patronage of the drive-in theatres particularly will be greatly reduced.

Prior to the effective date of the 1966 Act, the Interstate Commerce Commission, in 1961, defined the boundary between Eastern and Central time zones so that it approximately divided Indiana in half, placing the eastern half, including Indianapolis, in the Eastern time zone and the western half in the Central time zone.

Unlike the 1918 Act which it replaced, the 1966 Act does require the observance of advanced (daylight) time between April and October each year unless a state, by law, exempts the entire state from observance of advanced time. The Indiana state legislature attempted to exempt Indiana from advanced time provisions and passed the required resolution but the Governor of Indiana vetoed the exemption Act.

The District Court decided that the Secretary's decision was made in accordance with the Uniform Time Act of 1966 and was, therefore, lawful. Also, that the Secretary's decision was the result of a lawful time zone boundary proceeding conducted pursuant to the Administrative Procedure Act (5 U.S.C. § 553), and that the decision was not arbitrary and capricious or an abuse of the power provided by the Act. The denial of a motion for a preliminary injunction followed.

On this appeal, plaintiffs contend that the action of the Secretary of Transportation in setting the time boundaries for the State of Indiana 1) exceeded his statutory authority; 2) was not supported by reliable probative evidence, and 3) such action was arbitrary and capricious.

This case is before us on an appeal from the denial of a preliminary injunction. Therefore, our scope of re-

'view is as indicated in the case of *Solex Laboratories, Inc.* v. *Plastic Contact Lens Company*, 268 F.2d 637, 638 (7 Cir., 1959): " 'Upon an appeal from the granting or denial of a preliminary injunction, this Court has a very limited scope of review. . . . The sole issue here is whether the District Court abused its discretion.' " See also *United States* v. *Corrick*, 298 U.S. 435, 437-438 (1936)

Congress did not direct the Secretary to base his determination on the median meridian nor did it tell him where the boundaries between the time zones must be located.

The guide lines contained in 15 U.S.C. § 261 were ". . . The limits of each zone shall be defined by an order of the Interstate Commerce Commission [Secretary of Transportation], having regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce. . . ."

On August 3, 1967, the Secretary issued a Notice of Proposed Rule Making and acknowledged a petition by the Governor of Indiana proposing that the entire State of Indiana be placed within the Central time zone, and he solicited comments by interested citizens. The Notice also stated the Secretary would not be concerned with ". . . adherence to or exemption from advanced (daylight saving) time during the summer months" (32 F.R. 11478) since the Act required all states to observe advanced time unless they have exempted themselves by the passage of a state statute.

On January 16, 1968, the Secretary issued a modified proposal suggesting that all of Indiana except for thirteen counties in the Evansville and Gary areas be included within the Eastern standard time zone. The Secretary referred to the fact that he had received comments from ". . . nearly 50,000 interested persons and businesses and civic organizations. . . ." The Secretary noted that the modification of the Governor's proposal reflected the overwhelming opinion expressed by every area of the state.

(Appendix A)

The Secretary again invited all interested persons to submit their views and arguments. On January 10, 1969, the Secretary issued his decision, effective April 27, 1970, placing the State of Indiana in the Eastern time zone except for the twelve counties hereinbefore described.

Considering now the claims of appellant Theatre Owners, there can be no question but that the owners of outdoor theatres will be hurt financially if time will be advanced under the daylight saving time provision.

The District Court pointed out that mandatory observance of advanced time was due to the provisions of the Uniform Time Act and not to the decision by the Secretary.

The District Court specifically found that the Secretary's decision was made in accordance with the Uniform Time Act of 1966 and was, therefore, lawful. We agree!

The District Court also pointed out that the mandatory observance of Eastern daylight time is due to Section 3(a) of the Act. (15 U.S.C. §260 (a)) and to the veto of the Indiana Governor of the Act passed by the Indiana legislature which would have exempted the state from the observance of advanced (daylight saving) time.

Further, the District Court found and concluded that the Secretary's decision was not arbitrary or capricious or an abuse of the power provided by the Act. (15 U.S.C. § 261). Again, we agree!

We approve of findings and conclusions of the District Court and hold that they are fully supported by the record in this case.

Judgment

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 17866 — Friday, May 22, 1970

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

ALLIED THEATRE OWNERS OF INDIANA, INC., d/b/a THEATRE OWNERS OF INDIANA; SYNDICATE THEATRES, INC., and CAPITAL CITY THEATRE CORPORATION, *Plaintiffs-Appellants,* vs. JOHN A. VOLPE, as Secretary of Transportation, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this day.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALLIED THEATRE OWNERS OF INDIANA, INC., d/b/a THEATRE OWNERS OF INDIANA, SYNDICATE THEATRES, INC., and CAPITOL CITY THEATER CORPORATION,

Plaintiffs,

v.

JOHN A. VOLPE, as Secretary of Transportation,

Defendant.

Civil No. IP 69-C-148

ENTRY FOR APRIL 23, 1969

This cause came on to be heard on the 23rd day of April, 1969 on motion of the plaintiff for preliminary injunction; and due notice having been given to the defendants; and the Court having considered the evidence, the arguments of counsel and the memorandums filed by counsel in this matter, and being fully advised in the premises does now find the following:

1. The Secretary of Transportation's decision to relocate the time zone boundary between Central and Eastern Standard Time in Indiana, 34 Fed. Reg. 605 (January 16, 1969) was made in accordance with the Uniform Time Act of 1966, Title 15 United States Code Section 261 and was, therefore, lawful.

(Appendix C)

2. The Secretary of Transportation's decision was the result of a lawful time zone boundary relocation proceeding conducted by the Department of Transportation pursuant to the Administrative Procedures Act, Title 5, United States Code Section 553.

3. The plaintiffs have standing to sue the Secretary of Transportation in this cause.

4. The plaintiffs face potential harm by virtue of the advanced time provision of the Uniform Time Act, Title 15, United States Code, Section 260(a).

5. The Secretary of Transportation cannot be held responsible for any harm caused the plaintiffs by virtue of the advanced time provision of the Act as it is congressional mandate and the Secretary, therefore, does not have the power to exempt any State or any portion thereof from its effect.

6. The Secretary of Transportation's decision to relocate the Indiana time zone boundary as published in 34 Fed. Reg. 605. (January 16, 1969) was not arbitrary and capricious and was not an abuse of power provided for in Section 261 of the Uniform Time Act.

It is therefore, Ordered, Adjudged and Decreed that the motion of plaintiffs for preliminary injunction be and is hereby denied.

Dated: /s/ April 29, 1969

/s/ S. Hugh Dillin
Judge, United States District Court
Southern District of Indiana

APPENDIX D

Title 49—TRANSPORTATION
Subtitle A—Office of the Secretary of Transportation
[OST Docket No. 6; Amdt. 7]
PART 71—STANDARD TIME ZONE BOUNDARIES
Relocation of Standard Time Zone Boundary in State of Indiana

The purpose of this amendment to Part 71 of Title 49 of the Code of Federal Regulations is to change the existing boundary line between the eastern time zone and the central time zone as it applies to the State of Indiana.

The time zone boundary issue in the State of Indiana has been a complex one for many years. It is a State with strong economic ties both to the East and the Midwest, especially in relation to the cities of Detroit and New York on the one hand and Chicago on the other. Individual citizens, business associations, communications media, transportation facilities, municipal and county governments, schools, religious groups, and service organizations of all kinds are interested in and affected by the location of the time zone boundary line in Indiana, and many have conflicting needs and interests in regard to the time zone matter.

Historically, 15 counties in the State have observed central standard time in the winter months and central daylight time in the summer. These counties, as outlined in a map prepared by the Indiana State Chamber of Commerce in October 1966, are: Lake, Porter, La Porte,

St. Joseph, Marshall, Starke, Jasper, Newton, Gibson, Pike, Dubois, Spencer, Warrick, Vanderburgh, and Posey. The remaining Indiana counties have historically observed eastern standard time in the winter months, and, for the most part, non-advanced eastern time in the summer as well.

In 1961 the Interstate Commerce Commission, by administrative proceeding, modified the time zone boundary so that it divided the State approximately in half. Counties to the northeast, east, and southeast of Indianapolis, and that city itself, were placed in the eastern standard time zone. Counties to the northwest, west, and southwest of Indianapolis were placed in the central standard time zone. The line was not generally observed by a great many citizens of the State who continued to follow the historical pattern. This nonobservance presented no legal problem because there was no mandatory requirement for the observance of advanced [daylight] time. However, with the passage of the Uniform Time Act of 1966 which requires mandatory observance of advanced time during the April-October period in each time zone as determined by the time zone boundary line, the problem became acute.

The Uniform Time Act provides in pertinent part that—

> During the period commencing at 2 o'clock antemeridian on the last Sunday of April of each year and ending at 2 o'clock antemeridian on the last Sunday of October of each year, the standard time of each zone * * * shall be advanced 1 hour and such time as so advanced shall * * * be the standard time of such zone during such period.

(Appendix D)

The Act permits only one exception to the rule, to the effect that—

> * * * any State, may by law, exempt itself from the provisions of this subsection providing for the advancement of time, but only if such law provides that the entire State (including all political subdivisions thereof) shall observe the standard time otherwise applicable * * *. (15 U.S.C. 260a.)

The Act also provided authority to enforce its provisions by application to Federal District Courts for writs of injunction.

The Act thus created a problem for the State of Indiana, since the observance of advanced time in the time zones established by the ICC in 1961 was now legally binding on the State and, as of April 1, 1967, became enforceable by the newly created Department of Transportation. Officials of the State indicated to the Department that a modification of the existing time zone boundary line would be necessary. The Department decided to defer seeking injunctive action to enforce advanced time in the existing zones, while preparing for and conducting proceedings to determine how the line should be relocated. This decision was made pursuant to the statutory mandate (15 U.S.C. section 260) to "foster and promote widespread and uniform adoption and observance of the same standard of time within and throughout each such standard time zone". However, the Department announced both in 1967 and 1968 that the legal time in Indiana during the April to October period was to be in accordance with the existing zones.

On August 9, 1967, the Department initiated a proceeding (32 F.R. 11478) on the basis of a petition from

(Appendix D)

Governor Roger Branigin. The petition proposed that the entire State of Indiana be placed in the central standard time zone, which was logical from a geographic standpoint. The proposal issued by the Department afforded all interested persons a reasonable period in which to comment on the proposal.

Comments received from the counties in the northwestern and southwestern corners of the State indicated a strong preference for central time, the time those counties had historically observed. However, excluding those comments, most of the remaining chambers of commerce in the State and 88 percent of the business firms responding favored eastern time. In addition, comments received from labor unions, news media, civic groups, transportation and communications organizations, religious groups, and individuals (27,680 to 10,730) expressed a strong preference for eastern time.

When all of the evidence available had been tabulated and analyzed, the conclusion was that the central time proposal was unacceptable to a large segment of every group and geographical area responding, except the areas and businesses around Gary and Evansville. This 15-county area which has historically observed central time continued to favor central time except for two counties in the northwest—Marshall and St. Joseph Counties. The South Bend-Mishawaka Area Chamber of Commerce (St. Joseph County) favored eastern time and a detailed petition was sent to the Department explaining the reasons for placing St. Joseph County in eastern time. Marshall County is closely tied economically with St. Joseph County, and for that reason has indicated a preference for eastern time. Most of the 13 counties

around Gary and Evansville indicated that central time was a necessity for them. The general correspondence received from private citizens was overwhelmingly in favor of central time in both of those areas.

In general, the responses received from the areas outside of the Gary and Evansville areas indicated that there was a good deal of confusion as to the application of advanced (daylight) time. For example, many of the comments indicated a desire to be on eastern time the year around, without advanced (daylight) time in the summer. However, as outlined above, without State exemption from the advanced time provisions of the Uniform Time Act, this result could not be accomplished. The placement of any State in a time zone brings with it, as a matter of law, advanced time during the April-October period, unless that State specifically exempts itself. There are no legal means by which the Department of Transportation can place a State in a time zone without the automatic application of advanced time during the described period.

Based on the analysis of the comments received on the first proposal, a modified proposal was issued by the Department on January 16, 1968 (33 F.R. 765), to include the entire State within the eastern standard time zone except for six counties in the northwest and seven counties in the southwest areas of the State. Those 13 counties (Lake, Porter, Laporte, Starke, Jasper, Newton, Gibson, Pike, Dubois, Spencer, Warrick, Vanderburgh, and Posey), were to be included in the central standard time zone. This proposal was issued with the realization that many persons favoring eastern time did not favor eastern daylight time in the summer months. However,

the Department took account of the fact that it does not have any authority to change the advanced (daylight) time requirements of the Uniform Time Act, and worked on the assumption that if this were necessary, it would be a matter left to the State Legislature, as specifically provided in the Uniform Time Act.

Well over 90 percent of the comments received on the second proposal were in the form of newspaper clip-outs sponsored by Indiana organizations favoring central time which urged the Department to avoid "double-daylight time" in Indiana, and to keep the State on what is generally termed "slow time". In addition, somewhat over 1,900 individual letters contained the same recommendation. The term "double-daylight time", is at best both inaccurate and misleading. There is no such thing as "double" daylight time in any time zone. These comments indicated to the Department only that the commentator opposed being on advanced eastern time during the April-October period. They left to speculation the questions of whether the commentator wished to have eastern standard time for the remainder of the year, or whether he would reject eastern time completely in favor of central time (with advanced time) rather than accept eastern time with advanced time.

Of the individual letters that recommended either central or eastern time, excluding those received from the 13 northwestern and southwestern counties, 4,422 favored central time and 1,477 favored eastern time.

Of the 15 carriers which commented, 12 favored the proposal. These included: Eastern Airlines, Trans World Airlines, Delta Airlines, the Indiana Bus Association, the

(Appendix D)

C & E Trucking Corp., the Clemans Truck Line (South Bend), Transamerican Freight Lines (South Bend), Shippers Dispatch, Inc. (South Bend), George F. Burnett & Co. (South Bend), A.B.C. Coach Lines (Fort Wayne), and Specter Freight System, Inc. (South Bend). The only carrier expressly favoring central time was Ozark Airlines which said that its routes lend themselves to the central time zone structure. In addition, of 124 business firms which commented on the second proposal, 108 preferred eastern time and 16 central time.

Four of the six representatives of the communications industry that commented were in agreement with the Department's proposal, while the remaining two favored central time (both were newspapers—one from Jasper, Ind., which has always been in the central time zone, and the other from Cannelton, Ind., which is in the eastern time zone). Two newspapers and two radio-television stations expressed the view that the proposal would work to the advantage of their industry.

Four educational institutions (two school boards and two universities) also supported the proposal.

Various members of the Indiana Legislature and the Indiana Congressional delegation have also expressed the view that the Department's second proposal best meets the needs of commercial and public convenience.

In evaluating the comments on the two proposals, the Department had to weigh them not in the light of what was requested in the comments, but in the light of what would be possible to accomplish within the statutory prescriptions. Therefore, comments stating a preference for eastern standard time for the entire year had to be

carefully analyzed to determine what the commentators' preference would be considering that mandatory advanced time must be included for the April-October period. Most of the comments received from the area of the State favoring central time (northwestern and southwestern counties) indicated an understanding of and preference for central time with the mandatory advanced time. A great many of the other comments favoring eastern or central time did not contemplate this accompanying feature. Thus, the Department cannot attribute a reliable degree of accuracy to the profile of opinion reflected in the record. Such a degree of accuracy appears unattainable, given the substantial confusion and the mixed desires of the public which commented.

As stated before, Indiana has been a split State in many matters of time observation. It is an example of a State with strong ties both to New York and Chicago and with strong urban and rural concentrations. These factors have produced a split pattern of time observance that is out of phase with the State's geographical position.

As a result of its evaluation of all of the comments, with proper weight being assigned to those that did not squarely comment on the actual issue involved, the Department of Transportation is now of the opinion that, except for the 12 counties in the northwestern and southwestern corners of the State, the majority preference is clearly in favor of a form of eastern time for the remainder of the State. This conforms to the historical pattern of time observance, leaving aside the question of mandatory advanced time. This also conforms to the

strong preference shown by the business community and the common carriers whose needs are specially to be considered in setting time zone boundaries pursuant to 15 U.S.C. 261. Communications from Dubois County which, under the January 1968 proposal would have remained in the central time zone, have indicated strongly that it desires to be in the eastern zone. Accordingly, the boundary is being moved so as to include that county in the eastern zone.

In consideration of the foregoing, it has been decided to amend § 71.4(b) of Title 49 of the Code of Federal Regulations to place the entire State of Indiana in the eastern time zone, except for Lake, Porter, La Porte, Starke, Jasper, Newton, Gibson, Pike, Spencer, Warrick, Vanderburgh, and Posey Counties which remain in the central time zone. This action of altering the time zone boundary is necessary, in the Department's opinion, to foster and promote widespread observance of standard time to the fullest extent of the Department's authority. However, the Department is also of the opinion that to accommodate the very strong preference of the people of Indiana a means should be provided whereby that portion of the State being placed in the eastern time zone could have a legislative opportunity to be exempted from advanced time, without disrupting the activities of those in the central time zone who accept the advanced time situation.

Therefore, coincident with the release of this decision, the Department of Transportation is recommending legislation to the Congress that would authorize the legislature of any State having more than one time zone to exempt the portion of the State in any one time zone (or

the whole State, as now provided) from the mandatory requirements of the Uniform Time Act of 1966 for advanced time during the April-October period. Thus, if the Indiana Legislature determines that the portion of the State being placed in the eastern time zone does not desire to observe advanced time during the April-October period, it would be free, if the legislation proposed by the Department is enacted, to respond to that desire.

In consideration of the foregoing, § 71.4(b) of Title 49 of the Code of Federal Regulations is amended, effective 2 a.m. on April 27, 1969, to read as follows:

§ 71.4 *Boundary line between eastern and central zones.*

* * * * *

(b) *Indiana.* From the juncture of the western boundary of the State of Michigan with the northern boundary of the State of Indiana eastwardly along said northern boundary to the east line of La Porte County; thence southerly along the east line of La Porte County to the north line of Starke County; thence east along the north line of Starke County to the east line of Starke County; thence south along the east line of Starke County to the south line of Starke County; thence west along the south line of Starke County to the east line of Jasper County; thence south along the east line of Jasper County to the south line of Jasper County; thence west along the south lines of Jasper and Newton Counties to the western boundary of the State of Indiana; thence south along the western boundary of the State to the north line of Gibson County; thence east along the north lines of Gibson and Pike Counties to the east line of Pike County; thence south along the east lines of Pike and Warrick Counties to the north line of Warrick

(Appendix D)

County; thence east along the north lines of Warrick and Spencer Counties to the east line of Spencer County; thence south along the east line of Spencer County to the southern boundary of the State of Indiana.

* * * * *

(Act of Mar. 19, 1918, as amended by Uniform Time Act of 1966 (15 U.S.C. 260-267); sec. 6(c)(5), Department of Transportation Act (49 U.S.C. 1655(c)(5)))

Issued in Washington, D.C., on January 10, 1969.

/s/ Alan S. Boyd,
Secretary of Transportation.

[F.R. Doc. 69-565; Filed, Jan. 15, 1969; 8:47 a.m.]

APPENDIX E

STANDARD TIME
(28 U.S.C. §§ 260-267)

§ 260. *Congressional declaration of policy; adoption and observance of uniform standard of time; authority of Interstate Commerce Commission*

It is the policy of the United States to promote the adoption and observance of uniform time within the standard time zones prescribed by sections 261-264 of this title, as modified by section 265 of this title. To this end the Interstate Commerce Commission is authorized and directed to foster and promote widespread and uniform adoption and observance of the same standard of time within and throughout each such standard time zone. Pub.L. 89-387, § 2, Apr. 13, 1966, 80 Stat. 107.

§ 260a. *Advancement of time or changeover dates—Duration of period; State exemption*

(a) During the period commencing at 2 o'clock antemeridian on the last Sunday of April of each year and ending at 2 o'clock antemeridian on the last Sunday of October of each year, the standard time of each zone established by sections 261-264 of this title, as modified by section 265 of this title, shall be advanced one hour and such time as so advanced shall for the purposes of such sections 261-264, as so modified, be the standard time of such zone during such period; except that any State may by law exempt itself from the provisions of this subsection providing for the advancement of time, but only if such law provides that the entire State (includ-

ing all political subdivisions thereof) shall observe the standard time otherwise applicable under such sections 261-264, as so modified, during such period.

State laws superseded

(b) It is hereby declared that it is the express intent of Congress by this section to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for advances in time or changeover dates different from those specified in this section.

Violations; enforcement

(c) For any violation of the provisions of this section the Interstate Commerce Commission or its duly authorized agent may apply to the district court of the United States for the district in which such violation occurs for the enforcement of this section; and such court shall have jurisdiction to enforce obedience thereto by writ of injunction or by other process, mandatory or otherwise, restraining against further violations of this section and enjoining obedience thereto. Pub. L. 89-387, § 3, Apr. 13, 1966, 80 Stat. 107.

§ 261. *Zones for standard time; interstate or foreign commerce*

For the purpose of establishing the standard time of the United States, the territory of the United States shall be divided into eight zones in the manner provided in this section. Except as provided in section 260a (a) of this title, the standard time of the first zone shall be based on the mean solar time of the sixtieth degree of longitude west from Greenwich; that of the second

zone on the seventy-fifth degree; that of the third zone on the ninetieth degree; that of the fourth zone on the one hundred and fifth degree; that of the fifth zone on the one hundred and twentieth degree; that of the sixth zone on the one hundred and thirty-fifth degree; that of that seventh zone on the one hundred and fiftieth degree; and that of the eighth zone on the one hundred and sixty-fifth degree. The limits of each zone shall be defined by an order of the Interstate Commerce Commission, having regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce, and any such order may be modified from time to time. As used in sections 261-264 of this title, the term "interstate or foreign commerce" means commerce between a State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof. As amended April 13, 1966, Pub.L. 89-387, § 4(a), 80 Stat. 108.

§ 262. *Duty to observe standard time of zones.*

Within the respective zones created under the authority of sections 261-264 of this title the standard time of the zone shall insofar as practicable (as determined by the Interstate Commerce Commission) govern the movement of all common carriers engaged in interstate or foreign commerce. In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the Government, or relating to the time within which any rights shall accrue or determine, or within which

any act shall or shall not be performed by any person subject to the jurisdiction of the United States, it shall be understood and intended that the time shall insofar as practicable (as determined by the Interstate Commerce Commission) be the United States standard time of the zone within which the act is to be performed. As amended Apr. 13, 1966, Pub.L. 89-387, § 4(b), 80 Stat. 108.

§ 263. *Designation of zone standard times.*

The standard time of the first zone shall be known and designated as Atlantic standard time; that of the second zone shall be known and designated as eastern standard time; that of the third zone shall be known and designated as central standard time; that of the fourth zone shall be known and designated as mountain standard time; that of the fifth zone shall be known and designated as Pacific standard time; that of the sixth zone shall be known and designated as Yukon standard time; that of the seventh zone shall be known and designated as Alaska-Hawaii standard time; and that of the eighth zone shall be known and designated as Bering standard time. As amended Apr. 13, 1966, Pub.L. 89-387, § 4(c), 80 Stat. 108.

§ 264. *Part of Idaho in third zone.*

In the division of territory, and in the definition of the limits of each zone, as provided in sections 261-264 of this title, so much of the State of Idaho as lies south of the Salmon River, traversing the State from east to west near forty-five degrees thirty minutes latitude, shall be embraced in the third zone: *Provided,* That common

carriers within such portion of the State of Idaho may conduct their operations on Pacific time. Mar. 19, 1918, c. 24, § 3, as added Mar. 3, 1923, c. 216, 42 Stat. 1434, and amended June 24, 1948, c. 631, § 1, 62 Stat. 646.

§ 265. *Transfer of certain territory to standard central-time zone.*

The Panhandle and Plains sections of Texas and Oklahoma are transferred to and placed within the United States standard central-time zone.

The Interstate Commerce Commission is authorized and directed to issue an order placing the western boundary line of the United States standard central-time zone insofar as the same affects Texas and Oklahoma as follows:

Beginning at a point where such western boundary time zone line crosses the State boundary line between Kansas and Oklahoma; thence westerly along said State boundary line to the northwest corner of the State of Oklahoma; thence in a southerly direction along the west State boundary line of Oklahoma and the west State boundary line of Texas to the southeastern corner of the State of New Mexico; thence in a westerly direction along the State boundary line between the States of Texas and New Mexico to the Rio Grande River; thence down the Rio Grande River as the boundary line between the United States and Mexico: *Provided*, That the Chicago, Rock Island and Gulf Railway Company and the Chicago, Rock Island and Pacific Railway Company may use Tucumcari, New Mexico, as the point at which they change from central to mountain time and vice versa; the Colo-

rado Southern and Fort Worth and Denver City Railway Companies may use Sixela, New Mexico, as such changing point; the Atchison, Topeka and Santa Fe Railway Company and other branches of the Santa Fe system may use Clovis, New Mexico, as such changing point, and those railways running into or through El Paso may use El Paso as such point: *Provided further*, That this section shall not, except as herein provided, interfere with the adjustment of time zones as established by the Interstate Commerce Commission. Mar. 4, 1921, c. 173, § 1, 41 Stat. 1446.

§ 266. *Applicability of Administrative Procedure Act*

The Administrative Procedure Act shall apply to all proceedings under sections 260-267 of this title. Pub.L. 89-387, § 5, Apr. 13, 1966, 80 Stat. 108.

§ 267. *State defined*

As used in sections 260-263, 266 and 267 of this title, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States. Pub.L. 89-387, § 7, Apr. 13, 1966, 80 Stat. 109.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

ALLIED THEATRE OWNERS OF INDIANA, INC., d/b/a THEATRE OWNERS OF INDIANA, ET AL., PETITIONERS

v.

JOHN A. VOLPE, Secretary of Transportation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Petitioners are Indiana corporations which own and operate drive-in and indoor movie theaters in that state. They brought this action to challenge the decision of the Secretary of Transportation, under Section 4(a) of the Uniform Time Act of 1966, 15 U.S.C. 261 (Supp. V), to place most of Indiana in the eastern time zone (Pet. App. 9a-19a).[1] They com-

[1] Twelve counties in the northwestern and southwestern parts of the state were placed in the central time zone.

plained that, as a result of this decision, the sun would not set until 9:30 in this part of the state between April and October when it would be required to observe eastern daylight savings time. As a result, they claimed that patronage of their theaters, especially drive-ins, would be reduced.

The Uniform Time Act of 1966, 15 U.S.C. 260 *et seq.* (Supp. V), was enacted "to promote the adoption and observance of uniform time within the standard time zones prescribed by * * * this [Act]." Section 4(a) divides the country into eight zones and sets general boundaries. The eastern (second) zone must be between 75 and 90 degrees of longitude. Section 4(a) further provides:

> The limits of each zone shall be defined by an order of the * * * [Secretary of Transportation],[2] having regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce * * *.

Unlike its predecessor, the 1966 Act requires the observance of advanced (daylight) time between April and October unless a state by law exempts the entire state. 15 U.S.C. 260a(a) (Supp. V).

The Secretary defined the boundary in question after informal rule-making proceedings under the

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[2] The 1966 Act, like the prior 1918 Act, directed the Interstate Commerce Commission to carry out its policy. But before the Act became effective, the Commission's functions under the Act and earlier acts were transferred to the Secretary of the newly-created Department of Transportation (49 U.S.C. 1655(e)(5) (Supp. V)).

Administrative Procedure Act, 5 U.S.C. 553 (Supp. V). He published boundary proposals on two occasions and solicited comments from all interested persons in Indiana (Pet. App. 11a-17a). The Secretary also stated that, under the Act, he had no control over the observance or non-observance of daylight time (Pet. App. 4a). The order establishing the new boundary was issued in January, 1969 (Pet. App. 9a-19a). The Secretary noted that confusion regarding the mandatory observation of daylight time rendered certain comments ambiguous, but that aside from that issue, the boundary conformed to the majority preference, the historical pattern of time observance in the state,[3] and the "strong preference shown by the business community and the common carriers whose needs are specially to be considered in setting time zone boundaries pursuant to 15 U.S.C. 261" (Pet. App. 16a-17a).

A month before the new boundary was to become effective petitioners filed this action, seeking injunctive relief against its enforcement. The district court denied a preliminary injunction. Noting that theater

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[3] Most of Indiana historically had observed eastern standard time during the entire year, with some fifteen counties in the northwest and southwest observing central standard time in the winter months and central daylight time in the summer months. In 1961, the Interstate Commerce Commission, acting under the prior legislation (15 U.S.C. 261 *et seq.*) defined the boundary between the eastern and central time zones so that it divided Indiana approximately in half. But since the prior legislation did not require observance of daylight time during the summer months, most of Indiana chose to ignore the 1961 zones and, in general, continued to observe time based on the historical pattern. (Pet. App. 9a-10a.)

owners who testified had stated "that they could live with Eastern time as long as it wasn't Eastern advanced time," the court pointed out that mandatory observance of advanced time resulted from the Act rather than the Secretary's decision (Opinion of District Court, p. 12).[3] The court took judicial notice that the Indiana Legislature had attempted to exempt the state from the advanced time provisions but that the Governor had vetoed the exemption act. The court concluded that petitioners' grievance was not with the Secretary, but with the Governor of Indiana and that their remedy was political, not judicial (Opinion of District Court, p. 13). The court also found that the Secretary's decision was made in accordance with the Act, after lawful proceedings under the Administrative Procedure Act, and that it was neither arbitrary and capricious nor an abuse of power (Pet. App. 8a). The court of appeals affirmed (Pet. App. 1a-6a).

2. Petitioners' arguments were correctly rejected below. The Secretary has authority under the Act to fix the limits of each time zone, so long as the resultant boundaries are within those legislatively prescribed. Petitioners admit (Pet. 5) that the boundary of "about 88°" was within the prescribed meridian for Central Standard Time of 90° longitude.[4] The

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[3] The district court's opinion set forth at pp. 104-117 of petitioners' appendix before the court of appeals, which is on file with the Clerk.

[4] Petitioners' reference to prior Interstate Commerce Commission practice (Pet. 4) is unavailing, for it cannot alter the authorization granted to the Secretary by the 1966 Act. At

Act further requires the Secretary to consider "the convenience of commerce and the existing junction points and division points of common carriers in interstate or foreign commerce". It is undisputed that the Secretary acted in accordance with the preferences expressed by the majority of the Indiana businesses and common carriers responding to his solicitations.

Petitioners were not entitled to a hearing. The Act itself does not require one, but merely states that the Administrative Procedure Act is applicable to all proceedings conducted under it. 15 U.S.C. 266 (Supp. V). The Administrative Procedure Act, "standing alone does not require * * * a * * * hearing * * * as a part of rule making procedure." *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 50 (C.A. 9), certiorari denied, 389 U.S. 844. Therefore, the Secretary properly followed the informal rule-making procedure of the Administrative Procedure Act, 5 U.S.C. 553 (Supp. V), "which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules." *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 629 (C.A.D.C.).

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all events, the present boundary at about 88° longtitude is little different from the previous boundary of about 86° longitude set by the Commission in 1961.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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